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Supreme Court, U.S.
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No. 94-2102

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

U.A. LOCAL NO. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED PENSION TRUST FUND; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED HEALTH & WELFARE TRUST FUND; and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

Petitioners,

v.

NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC.; ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; and AUDREY JEAN PETTIT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether objective evidence of lawful intent in formation and operation of construction companies during a period of simultaneous operation may be considered as a factor in assessing whether the grant of summary judgment on an alter ego violation is proper?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Nor-Cal Plumbing, Inc.; North Bay Plumbing, Inc.; Elmar Lee Pettit, A.K.A. Elmer Lee Pettit; and Audrey Jean Pettit, respectfully request that this Court deny the Petition for Certiorari which seeks review of the

decision of the Ninth Circuit reported below at 48 F.3d 1465 and reproduced in the Petition for Certiorari at Appendix A.

JURISDICTION

Respondents concur with Petitioners' statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

Respondents concur with Petitioners' statement of statutory provisions involved.

STATEMENT OF THE CASE

A. Nature of the Case

Nor-Cal Plumbing was a union contractor. North Bay Plumbing was not. After a summary judgment motion the trial court concluded that Nor-Cal and North Bay were not separate employers and that North Bay was in fact the alter ego of Nor-Cal. The District Court awarded damages and punitive damages to Plaintiffs and found husband and wife Elmer (Lee) and Audrey Pettit personally liable. The Ninth Circuit left the finding of single employer undisturbed, but determined that the finding of alter ego failed to properly assess substantial disputed facts inconsistent with an alter ego judgment including, inter alia, the fact that the plumbing companies operated side by side for over half a decade during which time the union business prospered, enjoying a nearly 300% increase in revenues. The Court of Appeal further concluded that the bulk of Pettitioners' evidence on issues of fraud was irrelevant or unpersuasive, suggested that the issue of personal liability was probably wrongly decided even if there was an alter ego finding and did not decide whether

punitive damages could be properly awarded in an ERISA collection action.

REASONS FOR DENYING THE PETITION

The decision of the Ninth Circuit in this case stands for the unremarkable proposition that when, in weighing the variety of factors that taken together constitute the test for alter ego status, the fact that the two businesses operated side by side, successfully, with the union business increasing its business substantially suggests that the businesses were lawfully formed and operated. Not only did the union business not cease operations until years later when, after contract negotiations failed, union officials convinced Nor-Cal plumbers to quit, but its employment grew from ten men to 25-30 men and its gross income increased from $688,000 to over $2,500,000 during the years for which damages are sought. As the Ninth Circuit noted: "Had Pettit created North Bay with the intention of diverting all of Nor-Cal's business to his new non-union shop one would expect to find a relatively quick decrease in No-Cal's business accompanied by a corresponding increase in the business of North Bay." 48 F.3d 1465, 1474 (9th Cir. 1995) (Petition at p. 12a).

Neither the National Labor Relations Board or any Circuit Court of Appeal holds that intent in formation or operation may not be weighed as a factor, even a controlling factor, in a particular case, in a finding of alter ego liability. [1] In this context, as we shall explain in more detail below, Petitioners' suggestion that there is a conflict amongst the Circuits and with the Board misrepresents the cited case law.

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[1] In addition, the cited cases concern appellate review of a Board determination, the bases for which are different than those applicable in the instant case. See P. 4, et seq. , infra.

A. Stardyne, Inc. v. N.L.R.B., 41 F.3d 141 (3rd Cir. 1994)

Stardyne is legally and factually irrelevant. *Stardyne* involved a complete cessation of union operations by a manufacturer in the laser metal working aspects of its operations, with immediate resumption, with the same employees and management, as a non-union company. The legal finding of successor status was unchallenged on appeal and allegations of unlawful intent were not a factor in the Board's alter ego determination. However, neither the Board nor the court excluded intent as a meritorious issue - the legal controversy concerned, in part, whether intent was a necessary element of an alter ego determination. The latter controversy is not presented in our case.

The secondary "single employer" controversy presented by *Stardyne* on remand is also unrelated to the case at bar. Petitioners did not pursue a "single employer" theory of liability in the case below. If they had, the lack of a Board unit determination would have barred liability. *Nor-Cal* 48 F.3d 1470, Appendix at pp. 4a-5a.

***B. N.L.R.B v. Hospital San Rafael*, 42 F.3d 45 (1st Cir. 1994)**

Hospital San Rafael is irrelevant because the court based its decision, in a situation where there was no simultaneous operation, on the disguised continuance aspect of the alter ego test. In this limited context, which *Nor-Cal* case does not present, the "important' factor of motive was factually irrelevant. *Id*, 42 F.3d at 51. In *San Rafael*, the new hospital opened for operation 4 days after the old one closed and the old one surrendered its license to the new one. In *Nor-Cal*, the union business substantially increased its

employee complement, operations and revenues during more than one half decade of simultaneous operation.

In addition to the foregoing, *Hospital San Rafael* arose in the context of review of a board order, where the standards are very different from that of a summary judgment. As the *San Rafael* court noted - the "Board is entitled to a reasonable latitude in applying its own doctrine. See generally *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 18 L.R.R.M. 439 (1941). Whether the alter ego doctrine can be stretched much beyond the presents facts may be open to debate, but this case is within reasonable "limits." *Hospital San Rafael*, 42 F.3d at 52.

C. *N.L.R.B. v. Allcoast Transfer*, 780 F.2d 576 (6th Cir. 1986),

In *Allcoast Transfer*, the parent signatory company simply reconfigured a portion of its business because it had become a franchise of Atlas Moving. Under these circumstances, with little practical change in management or employees, a finding of continued application of the collective bargained agreement under a disguised continuance or sham transaction theory is also unremarkable.

Allcoast, *Stardyne* and *San Rafael Hospital* all properly stand for the principle that, in an alter ego determination, the court must take a flexible approach in making an overall assessment of alter ego status. Citing *J.M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029, 1033, 110 L.R.R.M 2296 (9th Cir. 1982); *Allcoast*, 780 F.2d at 581-582. The proposition advanced by Petitioners, that the Ninth Circuit held that unlawful intent is a necessary element in every alter ego case is <u>not</u> presented by the opinion below.

D. Prior Decisions of the Ninth Circuit, including *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147 (9th Cir. 1989

As we noted in our reply brief to the Ninth Circuit, the final straw man in Pettitioners' arsenal is their emphasis on *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147 (9th Cir. 1989), and their statement, which is not accurate, that the Ninth Circuit panel in *Nor-Cal* in any fashion suggested some novel re-working or departure from accepted alter ego analysis. In *Haley*, the employer's unlawful intent was a critical part of the finding of liability - the employer there transferred all the assets of one business to the other, fired all the workers, then required them to withdraw from the union in order to work for the second company *Id.*, 880 F.2d 1150. These are precisely the elements that are missing from the instant case and which are disputed, inter alia, by the independent evidence of the growth and prosperity of the union shop during the double breasted years.

CONCLUSION

In summation, Petitioners' submission in this case is a pencil without a point and should be summarily rejected. This case turns on evidence and that is why it has been remanded for trial. Judge William Schwarzer recognized this point when he denied Plaintiffs' First Petition To Attach:

> "[T]hese cases are very fact intensive. It is difficult to extrapolate from one to another, but this is essentially a case of sloppy management and carelessness about details. It is also a case of perceptions by others, because, obviously, Pettit had been -- Lee Pettit had been associated with this business for a long time, and it was very easy for people

> to assume that he would consider -- he would continue to be the guy that's running the job. But that doesn't -- that doesn't means that you can collect contributions on every job that North Bay did. You are going to have a lot more proof than that before I would let a verdict stand." (C.R. 151, p. 17 ll 12-22)

Respondents respectfully suggest the Court consider the suggestion of sanctions. After nearly a decade of litigation, and a clear and scholarly Ninth Circuit decision, the burden should no longer be on defendants to explain basic principles of alter ego doctrine to its opponent.

Respectfully submitted,

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